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NO. 71-1348

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

JEROME SOBEL, d/b/a SCRIPT SHOP EAST, *Petitioner*

v.

THE CITY OF LACY-LAKEVIEW, TEXAS, ET AL,
Respondent

PETITION FOR WRIT OF CERTIORARI

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ACTION PRINTING & PUBLISHING COMPANY, WACO, TEXAS

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NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

JEROME SOBEL, d/b/a SCRIPT SHOP EAST, *Petitioner*

v.

THE CITY OF LACY-LAKEVIEW, TEXAS, ET AL,
Respondent

PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, which judgment affirmed the judgment of the United States District Court for the Western District of Texas.

OPINIONS BELOW

The Court of Appeals did not write an opinion as the case was summarily affirmed. The Order of Dismissal by the trial judge is included herein as Appendix I, page 29.

JURISDICTION

This suit was instituted in the United States District Court seeking money damages against the City of Lacy-Lakeview, Texas, its Commissioner and City Secretary for discriminatory application of a city ordinance requiring toilet facilities for each sex. Jurisdiction was invoked pursuant to 42 U.S.C., Sec. 1983.

The District Court dismissed for want of jurisdiction on July 21, 1971. Timely appeal to the United States Court of Appeals for the Fifth Circuit was made and the case was placed on the Summary Calendar for disposition, and the lower court opinion was affirmed on January 20, 1972.

Jurisdiction to review this judgment is conferred on this court by 28 U.S.C. 1254 (1) which provides that cases in the courts of appeals may be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

42 U.S.C., Sec. 1983 which is set forth in Appendix A, infra, at page 10. 28 U.S.C., Sec. 1343 (3) which is set forth in Appendix B, infra, at page 11. 28 U.S.C. 1254 (1) which is set forth in the statement of Jurisdiction at page 2. The United States Constitution, Amendment XIV, Section 1, which is set forth in Appendix C, infra, at page 12.

QUESTION PRESENTED

Whether the Fourteenth Amendment's equal protection clause prohibits a city and its duly authorized agents, servants and employees from intentionally and arbitrarily enforcing an ordinance against a person who is in a similar situation to others upon which the ordinance is not enforced, and whether or not this constitutes a substantial federal question thereby invoking federal jurisdiction.

STATEMENT OF THE CASE

Petitioner brought this action against Respondents for damages sustained to his business during an eighty-three (83) day long injunction period.

The controversy between Petitioner and Respondents commenced in December, 1970, when Respondents sought and obtained an injunction enjoining Petitioner from engaging in the sale of liquor as a part of his drugstore operation. The injunction was based on a city ordinance set forth in Appendix D, infra, at page 13 requiring all buildings other than one-family units to have two separate toilets. Petitioner's drugstore had one bathroom.

Petitioner, aware of the fact that the ordinance was being arbitrarily applied against him because he had one month earlier put a liquor line in his drugstore, appealed the injunction to the 10th Court of Civil Appeals.

While the case was pending and while Petitioner was losing money every day that the injunction was in effect, Petitioner brought suit in the United States District Court in Civil Action No. W-71-CA-8 for a temporary restraining order prohibiting Respondents from enforcing the injunction against him as well as monetary damages. (Appendix F, infra, page 18) The Federal case was summarily dismissed because the Court chose not to interfere with the State court proceeding. (Appendix G, infra, at page 22)

interfere with the State court proceeding. (Appendix G, infra, at page 22)

The 10th Court of Civil Appeals subsequently upheld the injunction holding there was no "clear abuse of discretion" on the part of the trial judge who granted the temporary injunction. However, that court went on to say: "We might well be inclined to differ with the trial court if the appeal was on the merits from a permanent injunction."

The case was never tried on the merits in the state district court because the case became moot when Petitioner's landlord put in a second bathroom as a result of his being joined in the case as a party defendant.

Petitioner subsequently filed Civil Action No. W-71-CA-31, the action upon which this Writ is based, in the United States District Court for the Western District of Texas. See Appendix H, infra, at page 24. In this suit Petitioner alleged actual damages at $500.00 per day for each of the eighty-three (83) days that the injunction was in effect for actual damages in the amount of $41,500.00, and Petitioner further alleged exemplary damages in the amount of $25,000.00.

The case was summarily dismissed for want of jurisdiction by the United States District Judge in his Order dated July 21, 1971. See Appendix I, infra, page 29. On Appeal, the United States Court of Appeals for the Fifth Circuit affirmed by disposing of the case on the Summary Calendar.

Petitioner contends that the Respondents under color of state law arbitrarily enforced the local statute in question against Petitioner and deprived him of due process and equal protection under the laws, and for cause would show unto this Honorable Court the following:

(1) By its terms, the ordinance in question is fair on its face and is applicable to all businesses, yet the ordinance has been enforced arbitrarily.

(2) Other businesses including the Script Shop East have been allowed to operate without separate toilet facilities for many years.

(3) The ordinance was not applied to the Script Shop East until after a liquor line was added to the store's operation in November, 1970.

(4) The ordinance is not even applied to all liquor stores in Lacy-Lakeview, Texas.

(5) When Respondents sought and obtained a temporary injunction against Petitioner, only the liquor line portion of the store was enjoined from operating.

(6) That the ordinance in question becomes effective or not at the pleasure of individuals.

(7) That Petitioner complied with all state regulations and paid his fees to the state and was issued a retail sales liquor license by the State of Texas.

(8) That Petitioner subsequently applied for a liquor license in the City of Lacy-Lakeview, Texas, and fees were paid by Petitioner to City Secretary, Helen Latta.

(9) That although the city accepted Petitioner's money, the city did not issue the license, though Petitioner was not made aware of this fact.

(10) That Respondents subsequently filed a criminal complaint against Petitioner for operating without a liquor license in the City of Lacy-Lakeview.

(11) That Petitioner was tried and fined $50.00, but the case was dropped due to the fact that the ordinance upon which the complaint was based had no penalty provision.

(12) That the city subsequently sought injunctive relief against Petitioner on the basis that the building in which he was operating did not have two bathrooms.

(13) That there are apparently other reasons for this discrimination against Petitioner and Petitioner should be allowed to prove the fact of discrimination as well as the motives therefore before a jury in United States District Court.

ARGUMENT AMPLIFYING REASONS FOR GRANTING WRIT

The honorable United States District Judge dismissed this suit for want of jurisdiction stating that the complaint fails to raise a substantial federal question, and that Petitioner has merely been unsuccessful in state litigation. Such is not the case.

This cause has never been tried on the merits in any court at any time. There was a temporary injunction entered against Petitioner which was sustained on appeal because there was no "clear abuse of discretion." The temporary injunction was dissolved after eighty-three (83) days, was never made permanent, and was never decided on the merits.

Petitioner believes that the local 10th Court of Civil Appeals is the only court thus far to grasp the problem as presented by Petitioner.

That court stated in its opinion: "We might well be inclined to differ with the trial court if the appeal was on the merits from a permanent injunction." That court could see the discrimination and went on to say that, "Although we are unable to rationalize the apparent anomaly that Appellant was enjoined only from selling liquor – not from using the building, or operating a pharmacy – it is apparent that the trial court also was not attempting to decide the merits, but to maintain the status quo existing before Appellant began the attempted sale of liquor pending trial on the merits; and Appellant is not

in a position to complain that all of the relief sought against him was not granted," See Appendix E, infra, page 14.

The point is that it is not correct to say that Petitioner is merely an unsuccessful litigant in the state court and is seeking the same relief in the Federal courts as the Respondents would have you believe. Petitioner never filed a lawsuit in any state court relevant to this case. Petitioner was a defendant in an injunction proceeding only. Petitioner's cause of action has never been tried on the merits in any court in the land.

Petitioner has filed two suits in the United States District Court relevant to this case. The first suit was filed for the purpose of obtaining injunctive relief against enforcement of the temporary injunction granted in state court. The complaint also asked money damages. The Federal judge dismissed the suit primarily upon the court's policy of not prohibiting enforcement of a State Court's Order except in the most compelling circumstances.

The second suit, the one upon which this appeal is taken, seeks money damages at a time after the temporary injunction is dissolved and at a time when no State court action is pending. The Federal court has jurisdiction, yet the Federal judge thinks that this suit is just the same suit all over again, not realizing the very reason that he dismissed the first suit is no longer applicable.

The Federal courts have jurisdiction because of the "equal protection of laws" clause of the Fourteenth Amendment. The purpose of the "equal protection of laws" clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. Glicker v. Michigan Liquor Control Commission, 160 Fed. R 2d 96, Sixth Circuit Court of Appeals, 1947. That case goes on to

say "that it is well settled under the decisions of the U. S. Supreme Court that a state police regulation is, like any other law, subject to the equal protection clause of the Fourteenth Amendment. The fact that the Appellant is in the liquor business does not release the state from the restrictions on its regulatory power above referred to. It may authorize the state to impose more stringent regulations against those engaged in that business than are imposed against those engaged in other callings, but it affords no justification for discriminating between persons similarly situated who may be, or may desire to become, engaged in that calling."

The ordinance in our case is being applied to Petitioner, but not to others similarly situated in the same calling.

Petitioner's remedy is the Federal District Court, 28 U.S.C., Sec. 1343 (3), provides that the district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person to redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, or any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. Appendix B, infra, page 11.

CONCLUSION

The equal protection of the laws guaranteed by the Fourteenth Amendment means that any person has the right, on the same terms and on the same conditions as that of others, to come before the courts for the security of his property and person, and that he is guaranteed freedom from any burdens greater than those imposed upon other persons under similar conditions.

WHERE, PREMISES CONSIDERED, Petitioner prays that

this Petition be granted and that the judgment of the United States Court of Appeals for the Fifth Circuit be reviewed by this Court; that on such review the decision of the United States Court of Appeals for the Fifth Circuit be reversed and this cause be remanded for a new trial in the United States District Court for the Western District of Texas.

Respectfully submitted,

JOHN B. FAULKNER
EDWARDS, FAULKNER & GILES
316 Liberty Building
Waco, Texas 76701

Attorney for Petitioner

CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the foregoing Writ have been delivered to Q. Z. VALENTINE, 508 Franklin Avenue, Waco, Texas, Attorney for Respondents, this the _____ day of April, A.D., 1972.

This certificate is made pursuant to Supreme Court Rule 33 (b).

JOHN B. FAULKNER

Attorney for Petitioner

APPENDIX "A"

42, U.S.C.A., Section 1983:

Every person who, under color of any statute, ordinance or regulation, custom or usage of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

APPENDIX "B"

28 U.S.C., Sec. 1343. Civil rights and elective franchise:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person.

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42.

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent.

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights including the right to vote.

APPENDIX "C"

United States Constitution, Amendment XIV, Sec. 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX "D"

Ordinance – Southern Building Code, adopted 1960:

Toilet facilities shall be provided in all occupancies for each sex, except one family living units. The number provided for each sex shall be based on the maximum number of persons of that sex that may be expected to use such building at any one time.

APPENDIX "E"

AFFIRMED MARCH 11, 1971

NO. 4991

IN THE

COURT OF CIVIL APPEALS

FOR THE

TENTH SUPREME JUDICIAL DISTRICT OF TEXAS

AT WACO

JEROME SOBEL, DBA, THE SCRIPT SHOP EAST,
Appellant

VS.

THE CITY OF LACY-LAKEVIEW,
A MUNICIPAL CORP., *Appellee*

From the 19th District Court of McLennan County

OPINION

Appellee City obtained a temporary injunction restraining appellant from selling intoxicating liquor from his store. The petition alleged the City had adopted an ordinance requiring all buildings other than one-family units to have two separate toilets, and that appellant operated a drug and liquor store having only one; that the ordinance was to promote public health and sanitation, and irreparable injury would result unless appellant was enjoined.

Appellant answered that the pharmacy business had been operated in the same building for ten years without objection from the City, and that the City only undertook to enforce the ordinance after he obtained a license to sell liquor; that other businesses in the City were permitted to operate with a single toilet; that the City adopted and followed a policy of enforcing the ordinance only against liquor stores and cafes, which was unjust, arbitrary and discriminatory; and that "the enforcement of said injunction would be deprivation of property under Amendment 14 of the United States Constitution."

Although the evidence is not entirely clear, it is adequate to support the contention that the ordinance is ordinarily enforced only against filling stations, cafes, liquor stores and lounges (with the exception of recently constructed buildings, or those requiring inspection or obtaining a permit or license) during the past two years. Appellant's liquor license was granted in November, 1970. The City's petition was filed the following month.

Appellant's points are to the effect that the temporary injunction was unauthorized because the ordinance was arbitrarily applied; because the injunction deprives him of property under the Fourteenth Amendment; because there is no showing of threat of irreparable harm or substantial relation to public health or welfare; and because of laches.

The appellate court is not authorized to sustain or decide

these attacks on a temporary injunction. The scope of appellate review is "limited to the narrow question of whether the action of the trial judge" constitutes "a clear abuse" of discretion. Janus Films, Inc. v. City of Ft. Worth, 163 Tex. 616, 358 SW 2d 589 (1962).

In determining this single restricted issue the appellate court looks only to see that applicant showed a probably right and a probable injury. Camp v. Shannon, 162 Tex. 515, 348 SW 2d 517, 519; and if the record "tends to sustain" a cause of action, there is no abuse of discretion. Transport Co. of Texas v. Robertson Transports, 152 Tex. 551; 261 SW 2d 549, 552.

This court is not authorized to finally determine on a temporary injunction appeal the rights of the parties, as appellant's points would require. Southwest Weather Research, Inc. v. Jones, 160 Tex. 104, 327 SW 2d 417, 421. See cases cited, McLennan and Hill Counties, etc. v. Hurst (Tex. Civ. App., 1964, n.w.h.), 378 SW 2d 946, 948. The court does not decide the merits on such appeal. Houston Belt & Term. Ry. Co. v. Texas & New Orleans R. Co., 155 Tex. 407, 289 SW 2d 217. See cases cited, Long v. Employers' Casualty Co. (Tex. Civ. App., 1965) 392 SW 2d 161).

For example, constitutional questions are not ordinarily a proper subject for review or decision on a temporary injunction appeal. Shoppers Fair of North Houston, Inc. v. City of Houston (Tex. Civ. App. 1966, writ ref. n.r.e.), 406 SW 2d 86, 88; City of Houston v. Adams (Tex. Civ. App., 1959, writ ref. n.r.e.), 326 SW 2d 627, 630; State v. Markle (Tex. Civ. App. 1962, n.w.h.), 363 SW 2d 332,31 Tex. Jur. 2d Injunctions, Sec. 151.

We might well be inclined to differ with the trial court if the appeal was on the merits from a permanent injunction.

Although we are unable to rationalize the apparent anomaly that appellant was enjoined only from selling liquor – not from using the building, or operating a pharmacy – it is apparent that the trial court also was not attempting to decide the merits, but to maintain the status quo existing before appellant began the attempted sale of liquor pending trial on the merits; and appellant is not in a position to complain that all the relief sought against him was not granted.

We are unable to hold on this record that there was a clear abuse of the trial court's discretion. Affirmed.

/s/ Frank M. Wilson

FRANK M. WILSON
Associate Justice

APPENDIX "F"

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

WACO DIVISION

JEROME SOBEL, d/b/a
SCRIPT SHOP EAST,
Plaintiff

CIVIL ACTION
NO. W 71 CA 8

VS.

COMPLAINT

THE CITY OF LACY-LAKEVIEW, et al
TEXAS, A MUNICIPAL CORPORATION,
Defendant

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now JEROME SOBEL, doing business as SCRIPT SHOP EAST, complaining of the CITY OF LACY-LAKEVIEW, TEXAS, and W. D. PEARSON, and for cause of action would show to the Court the following:

I.

Plaintiff is a pharmacy engaged in the business of selling drugstore merchandise with cosmetic, veterinary and liquor lines as a part of the same store. Defendant is the CITY OF LACY-LAKEVIEW, TEXAS, the municipality in which Plaintiff's business is located. Service of process may be had upon HELEN LATTA, City Secretary, at 501 E. Craven, Lacy-Lakeview, Texas, and upon W. D. PEARSON at 115 Oak of the same city.

All parties reside and have their principle places of business in the jurisdiction of the United States District Court, Western District of Texas, Waco Division.

II.

Jurisdiction of this Court is invoked pursuant to Title 42 U.S.C.A., Section 1983, which states:

> "Every person who, under color of any statute, ordinance or regulation, custom or usage of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

In 1960, the CITY OF LACY-LAKEVIEW, TEXAS, adopted an ordinance providing that toilet facilities shall be provided in all occupancies for each sex, except one family living units. The City did not seek to enforce this ordinance against Plaintiff until 1970, after a liquor line was added to the store's operation. Then the City sought a temporary injunction against Plaintiff's entire business. An injunction was issued restraining him from the sale of alcoholic beverages to be consumed off premises. This temporary injunction was granted despite the fact that the ordinance was arbitrarily applied by city officials to particular businesses only, and the defense of laches was affirmatively pleaded and proved, and there was no threat of irreparable harm, and no substantial relation in enforcement of the ordinance to the health, safety, morale or general welfare of the community.

Your Plaintiff subsequently filed a Motion to Supersede the judgment which was denied. A subsequent Motion in the Court of Civil Appeals to stay the injunction pending hearing was

denied. Plaintiff then perfected an appeal to the same court, upon which hearing is currently pending. While appeal is pending, Plaintiff is suffering damages from day to day.

IV.

Plaintiff would show, although the ordinance in question is fair on its face, its unequal application to those who are entitled to be treated alike amounts to a denial of equal protection because the City in enforcing the ordinance is guilty of purposeful discrimination. The facts are that while the ordinance is directed against all businesses, in fact, it is enforced only against liquor stores, filling stations, cafes, restaurants and lounges. Such unlawful administration under color of State law has subjected Plaintiff to a deprivation of rights, privileges and immunities secured by the Fourteenth Amendment of the Federal Constitution.

V.

Whereupon, because Plaintiff is suffering additional damages for each day that he remains under temporary injunction, that such damages amount to, a manifest oppression of Plaintiff's guaranteed civil liberties, and because such vital necessity exists for action, Plaintiff petitions that the CITY OF LACY-LAKEVIEW, TEXAS, be enjoined from seeking to enforce any injunction against Plaintiff's right to earn a livelihood.

VI.

Plaintiff further petitions that because Defendant purposely and maliciously discriminated against Plaintiff, that Defendant be caused to answer in damages for its wrongful action. Plaintiff has suffered actual damages in the amount of $500.00 per

day for each day that the temporary injunction against him remains in effect. Injunction has been in effect for twenty-one (21) days as of January 27, 1971.

VII.

Through Defendant's wrongful action, Plaintiff has further suffered exemplary damages in the amount of $25,000.00.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Defendant be cited to appear and answer herein as required by law, that a temporary restraining order be issued, that Defendant be enjoined from seeking to enforce the temporary injunction against Plaintiff, that the Court appoint a date for hearing upon notice of this application for a temporary injunction, that upon final hearing hereof he recover of the Defendant damages in the amount of $500.00 per day during the temporary injunction period and $25,000.00 exemplary damages, and for such other and further relief, special and general, legal or equitable, to which he may be entitled.

EDWARDS, FAULKNER & GILES
316 Liberty Building
Waco, Texas 76701

BY: /s/ John B. Faulkner
JOHN B. FAULKNER

Attorneys for Plaintiff

APPENDIX "G"

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

WACO DIVISION

JEROME SOBEL

VS.

CIVIL ACTION
NO. W-71-CA-8

CITY OF LACY-LAKEVIEW

ORDER OF DISMISSAL

Plaintiff seeks damages and temporary restraining order against the city's enforcement of an injunction against his business for failure to comply with a city ordinance requiring toilet facilities for each sex. Plaintiff claims the ordinance has be unequally applied against liquor stores and others thereby constituting a deprivation of rights, privileges and immunities, and a denial of equal protection under the 14th Amendment for which an action lies under 42 U.S.C. Sec. 1983. In effect, Plaintiff is asking for an injunction against an injunction issued by the state court. Such relief is barred by 28 U.S.C. Sec. 2283 which provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress . . .

This prohibition "is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process." Hill v. Martin,

296 U.S. 393, 403 (1935); Norwood v. Pasenteau, 228 F. 2d 148, 150 (ith Cir. 1955), cert. denied 351 U.S. 955. "Injunctions are also prohibited which restrain litigants from prosecuting or going forward with state proceedings. . . . . Moreover, an injunction against execution or other proceeding to enforce a state judgment is forbidden as well as one against the prosecution of state litigation to obtain a judgment." Muscarelle, Inc. v. Central Iron Mfg. Co., 328 F. 2d 791, 793 (3rd Cir. 1964). Clearly Plaintiff is seeking to involve the federal courts in prohibiting enforcement of a state court order. This is contrary to the statutory command that such interference be avoided.

The next question is whether the Civil Rights Statute, 42 U.S.C. Sec. 1983, relied upon by Plaintiff, falls within the exception to Sec. 2283. Although the Supreme Court has expressly left open this question, see Cameron v. Johnson, 390 U.S. 611, 613 (1968); Baines v. City of Danville, 337 F. 2d 579, 590-91 (4th Cir. 1964), cert. denied, 381 U.S. 939, found no such exception created by Sec. 1983. At least it can be said that Sec. 1983 does "not warrant intervention except in the most extreme set of circumstances." Since Plaintiff has failed to demonstrate such compelling circumstances. 28 U.S.C. Sec. 2283 directs dismissal of this suit.

For the foregoing reasons, it is therefore ORDERED, ADJUDGED AND DECREED that this suit be, and hereby is, DISMISSED.

Signed at Austin, Texas, this 2nd day of February, 1971.

/s/ Jack Roberts

UNITED STATES DISTRICT JUDGE

APPENDIX "H"

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

WACO DIVISION

JEROME SOBEL, d/b/a
SCRIPT SHOP EAST, *Plaintiff*

CIVIL ACTION
NO. W-71-CA-31

VS.

FIRST AMENDED
COMPLAINT

THE CITY OF LACY-LAKEVIEW, TEXAS, A MUNICIPAL CORPORATION, ET AL, *Defendants*

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now, JEROME SOBEL, doing business as SCRIPT SHOP EAST, complaining of the CITY OF LACY-LAKEVIEW, TEXAS, and its Commissioner, W. D. PEARSON, and for cause of action would show the Court the following:

I.

Plaintiff is a pharmacy engaged in the business of selling drug-store merchandise with cosmetic, veterinary and liquor lines as a part of the same store. Defendants are the CITY OF LACY-LAKEVIEW, TEXAS, the municipality in which Plaintiff's business is located, and W. D. PEARSON, the Commissioner of the same city. Service of process may be had upon HELEN LATTA, City Secretary, at 501 E. Craven, Lacy-Lakeview, Texas, and upon W. D. PEARSON at 115 Oak of the same city. All parties reside and have their principal places of business

in the jurisdiction of the United States District Court, Western Division of Texas, Waco Division.

II.

Jurisdiction of this Court is invoked pursuant to Title 42, U.S.C.A., Section 1983, which states:

> "Every person who, under color of any statute, ordinance or regulation, custom or usage of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

III.

In 1960, the CITY OF LACY LAKEVIEW, TEXAS, adopted an ordinance providing that toilet facilities shall be provided in all occupancies for each sex, except one family living units. The City did not seek to enforce this ordinance against Plaintiff until 1970, after a liquor line was added to the store's operation. Then the City sought a temporary injunction against Plaintiff's entire business. An injunction was issued restraining him from the sale of alcoholic beverages to be consumed off premises. This temporary injunction was granted despite the fact that the ordinance was arbitrarily applied by city officials to particular businesses only, and the defense of laches was affirmatively pleaded and proved, and there was no threat of irreparable harm, and no substantial relation in enforcement of the ordinance to the health, safety, morals or general welfare of the community.

Your Plaintiff subsequently filed a Motion to Supersede

the judgment which was denied. A subsequent Motion in the Court of Civil Appeals to stay the injunction pending hearing was denied. Plaintiff then perfected an appeal to the same court. The appeal became moot and the temporary injunction was dissolved when Plaintiff's landlord was enjoined in the suit, whereupon the landlord immediately installed a second bathroom. The land and building owner was never contacted or requested in any manner to install the toilet facility before Plaintiff was enjoined, and not until some 83 days later was the building owner made a party to the suit.

IV.

Plaintiff would show, although the ordinance in question is fair on its face, its unequal application to those who are entitled to be treated alike amounts to a denial of equal protection because the City in enforcing the ordinance is guilty of purposeful discrimination. The facts are that while the ordinance is directed against all businesses, in fact, it is enforced only against liquor stores, filling stations, cafes, restaurants and lounges when it is enforced, and it is not uniformly enforced against these classes of business. Such unlawful administration under color of State law has subjected Plaintiff to a deprivation of rights, privileges and immunities secured by the Fourteenth Amendment to the Federal Constitution.

Plaintiff would further show that this unlawful administration deprived the Plaintiff of the right to engage in gainful occupation because he was denied a liquor license by Defendants. W. D. PEARSON, acting under color or state authority while others in the same position as Plaintiff were allowed to operate.

V.

Plaintiff would show that because Defendant purposely and maliciously discriminated against Plaintiff, that Defendant be

caused to answer in damages for its wrongful action. Defendant, W. D. PEARSON, was acting at all times mentioned herein both individually and as the agent, servant and employee of the CITY OF LACY-LAKEVIEW, TEXAS, and acting within the scope and course of his employment with full authority. Plaintiff suffered actual damages in the amount of $500.00 per day for each day that the temporary injunction against him was in effect. Injunction was in effect for eighty-three (83) days to his damages in the amount of $41,500.00.

VI.

Through Defendant's wrongful action, Plaintiff has further suffered exemplary damages in the amount of $25,000.00.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Defendant be cited to appear and answer herein as required by law; that upon final hearing hereof he recover of the Defendants, jointly and severally, damages in the amount of $41,500.00 and $25,000.00 exemplary damages, and for such other and further relief, special and general, legal or equitable, to which he may be entitled.

EDWARDS, FAULKNER & GILES
316 Liberty Building
Waco, Texas 76701

BY: /s/ John B. Faulkner
JOHN B. FAULKNER

Attorneys for Plaintiff

A copy of the foregoing instrument has been delivered to Q. Z. Valentine, 508 Franklin Avenue, Waco, Texas, Attorney

for Defendant, this the 1st day of June, 1971.

/s/ John B. Faulkner

APPENDIX "I"

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

WACO DIVISION

JEROME SOBEL, DBA
SCRIPT SHOP EAST

VS. W-71-CA-31

THE CITY OF LACY-LAKEVIEW,
ET AL

ORDER OF DISMISSAL

Plaintiff has returned to this forum following this Court's Order of Dismissal in a similarly styled case, W-71-CA-8 (Feb. 3, 1971). In the previous action Plaintiff sought damages and a temporary restraining order against the city's enforcement of an injunction against his business for failure to comply with a city ordinance requiring toilet facilities for each sex. Plaintiff claimed that the ordinance had been unequally applied against liquor stores and others thereby constituting a deprivative of rights, privileges and immunities, and a denial of equal protection under the Fourteenth Amendment for which an action allegedly could be maintained under 42 U.S.C. Sec. 1983.

Plaintiff's current complaint tracts the earlier version almost verbatim with the major revision that the injunctive relief is deleted so that Plaintiff requests solely damages. The asserted injury is in the amount of $500 dollars per day for each of the eighty-three days during which the city had an injunction against

the operation of his business for failure to comply with the toilet ordinance. In addition, Plaintiff claims $25,000 in exemplary damages.

Plaintiff's desire to retravel almost the same path leads to the same end, although wasting a good deal of client, attorney and judicial time along the way.

The temporary injunction described by the complaint was granted by the 19th Judicial District Court of McLennan County and appealed unsuccessfully by Plaintiff. Sobel v. The City of Lacy-Lakeview, _____ SW 2d _____ (Tex. Civ. App. Waco, 1971, no writ). Plaintiff did not choose to further pursue his state judicial remedies by requesting rehearing or appealing to the Texas Supreme Court. The action was eventually dismissed in the District Court upon the City's motion showing that Plaintiff had installed a second restroom as required by the ordinance.

This court is without jurisdiction where the complaint fails to raise a substantial federal question. See Williams v. Miller, 48 F. Supp. 277 (N. D. Cal. 1942), aff'd 317 U.S. 599. Here Plaintiff has not been denied a liquor license as in Hornsby v. Allen, 326 F 2d 605 (5th Cir. 1964), rather he has merely been unsuccessful in state litigation. Considering this background and the nature of the complaint's allegations, Plaintiff fails to raise any substantial federal question; he makes wholly insubstantial and frivolous contentions. See Jemzura v. Belden, 281 F. Supp. 100 (N. D. N. Y. 1968).

Accordingly, IT IS ORDERED that the above styled cause be, and is hereby, DISMISSED for want of jurisdiction. The Defendants' motions to dismiss are GRANTED.

Entered this 21st day of July, 1971, in Austin, Texas.

/s/ Jack Roberts

JACK ROBERTS
United States District Judge